

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

MORSE E. STEWART, )  
)  
Plaintiff, )  
)  
v. )  
)  
WASHINGTON MUTUAL, FA; FIRST )  
PACIFIC MORTGAGE CO., INC.; )  
U S BANK NATIONAL ASSOCIATION;) )  
CREDIT SUISSE FIRST BOSTON, )  
MORTGAGE SECURITIES CORP - )  
CSFB, MORTGAGE PASS THROUGH )  
CERTIFICATE SERIES 2003-23; )  
MORTGAGE ELECTRONIC )  
REGISTRATION SYSTEM; NORTHWEST) )  
TRUSTEE SERVICES, INC.; JOHN )  
DOE(S); JANE DOE(S), )  
)  
Defendants. )  
)

No. CV-09-1180-HU

FINDINGS & RECOMMENDATION

Morse Edward Stewart  
57985 Timber Road  
Vernonia, Oregon 97064

Plaintiff Pro Se

Jason M. Pistacchio  
Kimberly R. Griffith  
COSGRAVE VERGEER KESTER LLP  
805 S.W. Broadway, 8th Floor  
Portland, Oregon 97205

Attorneys for Defendant First Pacific Mortgage Company, Inc.

1 - FINDINGS & RECOMMENDATION

1 Teresa M. Shill  
2 ROUTH CRABTREE OLSEN, P.C.  
3 11830 S.W. Kerr Parkway, Suite 385  
4 Lake Oswego, Oregon 97035

5 Attorney for All Other Non-Doe Defendants

6 HUBEL, Magistrate Judge:

7 Pro se plaintiff Morse E. Stewart brings this action against  
8 several defendants. The named defendants move to dismiss under  
9 Federal Rules of Civil Procedure 8 and 12. I recommend that the  
10 motions be granted.

#### 11 BACKGROUND

12 The Complaint, filed October 5, 2009, is a jumble of words,  
13 citations, and assertions which together make little sense. For  
14 example, the caption of the Complaint includes the assertions that  
15 the case is a "Complaint of Fraud in Trustee's Sale No. 7763.24398  
16 Clackamas County, Oregon," that it is brought "In Admiralty," and  
17 that it is submitted by a "Secured Party Creditor, In Propria  
18 Persona, on behalf of Plaintiff & Self." Compl. at p. 1.

19 As best as can be discerned, plaintiff seeks an order quashing  
20 non-judicial foreclosure proceedings involving real property in  
21 Clackamas County, Oregon, and also seeks a money judgment for more  
22 than \$35 million. See Compl. at p. 3 (noting property located at  
23 3040 SE Persons Court, Milwaukie, Oregon 97267); p. 5 (referring to  
24 standing to bring a trustee's sale); p. 11 (requesting Court to  
25 quash foreclosure and pay damages to plaintiff). Plaintiff  
26 expressly alleges that "Defendant(s) are in violation of FRCP IV  
27 17(a), RESPA 12 USC sec. 2605(e), TILA sec 1604(e), 15 USC 1601 et  
28 seq. and FDCPA 15 USC sec 1692c." Id. at p. 4.

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2 - FINDINGS & RECOMMENDATION

## STANDARDS

Defendants all initially move to dismiss for lack of subject matter jurisdiction. Other bases for the motions are discussed below.

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(1) addresses the court's subject matter jurisdiction. The party asserting jurisdiction bears the burden of proving that the court has subject matter jurisdiction over his claims. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

A Rule 12(b)(1) motion may attack the substance of the complaint's jurisdictional allegations even though the allegations are formally sufficient. See Corrie v. Caterpillar, Inc., 503 F.3d 974, 979-80 (9th Cir. 2007) (court treats motion attacking substance of complaint's jurisdictional allegations as a Rule 12(b)(1) motion); Dreier v. United States, 106 F.3d 844, 847 (9th Cir. 1996) ("[U]nlike a Rule 12(b)(6) motion, a Rule 12(b)(1) motion can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency[.]") (internal quotation omitted). Additionally, on a Rule 12(b)(1) motion, the court may consider evidence outside the pleadings to resolve factual disputes. Robinson v. United States, No. 07-17052, 2009 WL 3525634, at \*1 (9th Cir. Nov. 2, 2009); see also Dreier, 106 F.3d at 847 (a challenge to the court's subject matter jurisdiction under Rule 12(b)(1) may rely on affidavits or any other evidence properly before the court).

## DISCUSSION

I. Subject Matter Jurisdiction Under 28 U.S.C. §§ 1331, 1332

3 - FINDINGS & RECOMMENDATION

1 Federal courts are courts of limited jurisdiction.  
2 Guglielmino v. McKee Foods Corp., 506 F.3d 696, 700 (9th Cir.  
3 2007). Federal district courts have subject matter jurisdiction in  
4 (1) cases that raise a federal question and (2) cases in which  
5 there is diversity of citizenship among the parties. See 28 U.S.C.  
6 §§ 1331-32.<sup>1</sup> Unless plaintiff's complaint falls into one of these  
7 two categories, it must be dismissed for lack of subject matter  
8 jurisdiction.

9 A. Diversity Jurisdiction

10 A federal district court has subject matter jurisdiction of  
11 all civil actions where the matter in controversy exceeds the sum  
12 of \$75,000, and the action is between citizens of different states.  
13 28 U.S.C. § 1332. In the jurisdictional allegation section of the  
14 Complaint, plaintiff contends that this Court has jurisdiction  
15 because, inter alia, "[t]he Plaintiff and some of the Defendants  
16 are from different states . . . [and] [t]he amount in question  
17 exceeds \$75,000." Compl. at p. 3.

18 Although there are scant facts alleged in support of  
19 plaintiff's request for \$35 million in damages, I assume for the  
20 purposes of this motion that the damages sought exceed the \$75,000  
21 diversity jurisdiction requirement. However, as plaintiff himself  
22 seems to recognize, not all of the defendants possess non-Oregon  
23 citizenship, a fact fatal to maintaining diversity jurisdiction.

24 "Diversity jurisdiction requires complete diversity between  
25 the parties-each defendant must be a citizen of a different state  
26 from each plaintiff." In re Digimarc Corp. Derivative Litig., 549

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27  
28 <sup>1</sup> I address plaintiff's reference to admiralty, below.

1 F.3d 1223, 1234 (9th Cir. 2008). Here, although plaintiff does not  
2 expressly assert his citizenship for diversity jurisdiction  
3 purposes, he completed a civil action cover sheet in which he  
4 listed a Vernonia, Oregon address and stated that his residence is  
5 Columbia County. Several attachments to the Complaint show this  
6 same address for plaintiff.

7 Plaintiff fails to affirmatively allege the state of  
8 incorporation and principal place of business of each defendant.  
9 28 U.S.C. § 1332(c)(1) (corporation deemed to be citizen of any  
10 state by which it has been incorporated and of the state where it  
11 has its principal place of business). However, defendant First  
12 Pacific Mortgage Company<sup>2</sup> submits a statement from the Oregon  
13 Secretary of State's Business Registry showing that First Pacific  
14 is incorporated in Oregon and has its principal place of business  
15 here. Thus, complete diversity is lacking and there is no  
16 diversity jurisdiction under 28 U.S.C. § 1332.

17 B. Federal Question

18 Federal district courts have "original jurisdiction of all  
19 civil actions arising under the Constitution, laws, or treaties of  
20 the United States." 28 U.S.C. § 1331. Plaintiff makes no express  
21 allegation that this Court's jurisdiction is based on a federal  
22 question. There is no express assertion in the section of the  
23 Complaint reciting plaintiff's "Cause of Action Cites," of a claim  
24 arising under the Constitution or a treaty.

25 Plaintiff does, however, make the following allegation: "As  
26

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27 <sup>2</sup> Now known as First Pacific Associates, Inc. Exh. A to  
28 Nov. 19, 2009 Declr. of Kimberly Griffith.

1 will become clear, in the causes of action below, the Defendant(s)  
2 are in violation of FRCP IV 17(a), RESPA 12 USC sec. 2605(e), TILA  
3 sec. 1604(e), 15 USC 1601 et seq. and FDCPA 15 USC sec. 1692c."  
4 Compl. at p. 4. I understand the first reference to be to Federal  
5 Rule of Civil Procedure 17(a), addressing the real party in  
6 interest in a civil action. An alleged violation of a procedural  
7 rule does not create federal question jurisdiction. See Pineville  
8 Real Estate Operation Corp. v. Michael, 32 F.3d 88, 89 (4th Cir.  
9 1994) (interpretation of Federal Rules of Civil Procedure  
10 insufficient to confer federal jurisdiction) (per curiam); see also  
11 Waris v. Ormond, No. CIV 08-5709 (RBK), 2009 WL 2385891, at \* 3-4  
12 (E.D. Pa. July 29, 2009) (rejecting argument that federal  
13 jurisdiction exists whenever a plaintiff alleges a violation of the  
14 Federal Rules of Civil Procedure).

15 As for the remaining citations, they refer to (1) the Real  
16 Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601-2617;  
17 (2) the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1615; and  
18 (3) the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-  
19 1692p. The specific statutory sections cited by plaintiff lead me  
20 to conclude that plaintiff alleges a violation of (1) that part of  
21 the RESPA outlining the duties of loan servicers to respond to  
22 borrower inquiries under 12 U.S.C. § 2605(e); (2) that part of the  
23 FDCPA governing communications with a consumer under 15 U.S.C. §  
24 1692c; and (3) some part of TILA under 15 U.S.C. § 1604 governing  
25 disclosure guidelines.<sup>3</sup>

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26  
27 <sup>3</sup> Plaintiff cites to "TILA sec. 1604(e)," but section 1604  
28 contains no subsection (e).

1 As noted above, plaintiff's string of federal statutory  
2 citations under the "Cause of Action" heading is preceded by an  
3 indication that the particulars of his claims "will become clear []  
4 in the causes of action below[.]" Compl. at p. 4. Following this,  
5 plaintiff lists three causes of action: (1) "Defendants Have Not  
6 Proven Standing to Foreclose"; (2) "Defendants Never Loaned Any  
7 'Money' and Defendants Have Been Paid"; and (3) "Admissions and  
8 Confessions." In the first cause of action, plaintiff seems to  
9 contend that defendants have no proof that they have standing or  
10 are a real party in interest. Id. at pp. 4-7. In the second cause  
11 of action, plaintiff suggests that "defendants" were paid when they  
12 sold the original promissory note. Id. at p. 7. In the third,  
13 plaintiff lists five alleged "confessions" by defendants, including  
14 that defendants confess and admit that they owe plaintiff \$35  
15 million in damages. Id. at pp. 7-11.

16 Plaintiff's allegations under his three causes of actions are  
17 problematic in many respects. In regard to jurisdiction, however,  
18 they appear to bear no relation at all to the federal statute  
19 citations immediately preceding them. As a result, as far as  
20 establishing federal question jurisdiction of this action, the  
21 Complaint contains only a string of citations to federal statutes.  
22 Such passing references, without more, are insufficient to  
23 establish a federal question. E.g., Polkey v. Waste Mgmt of Wa.,  
24 Inc., No. C09-0447-JCC, 2009 WL 1936257, at \*3 (W.D. Wa. July 6,  
25 2009) (vague, ambiguous, or passing references to federal law in a  
26 complaint are not sufficient to support federal question  
27 jurisdiction); Matthews v. Stewart, 207 F. Supp. 2d 496, 499 (M.D.  
28 La. 2001) (casual reference to two federal statutes raised no issue

1 of federal law and failed to establish federal question  
2 jurisdiction); see also Easton v. Crossland Mortgage Corp., 114  
3 F.3d 979, 982 (9th Cir. 1997) ("the mere reference of a federal  
4 statute in a pleading will not convert a state law claim into a  
5 federal cause of action if the federal statute is not a necessary  
6 element of the state law claim and no preemption exists") (per  
7 curiam).

8 As noted above, because defendants raise the lack of subject  
9 matter jurisdiction under Rule 12(b)(1), I may consider evidence  
10 outside of the Complaint. Defendants submit evidence demonstrating  
11 that the genesis of the dispute plaintiff has with defendants is a  
12 pending non-judicial foreclosure of real property located in  
13 Clackamas County, Oregon. The exhibits show that on or about April  
14 29, 2003, plaintiff executed and delivered to, and for the benefit  
15 of, defendant Mortgage Electronic Registration Systems, Inc., as  
16 nominee for lender First Pacific, a Deed of Trust encumbering the  
17 real property located in Milwaukie, Oregon. Jeff Stenman Declr. at  
18 p. 1; Exh. 1 to Stenman Declr. The Deed of Trust was recorded in  
19 Clackamas County as instrument number 2003-055065. Id. The Deed  
20 of Trust was subsequently assigned to defendant U.S. Bank National  
21 Association as Trustee for CSFB 2002-23. Id.; Exh. 2 to Stenman  
22 Declr. The assignment was recorded in Clackamas County as  
23 instrument number 2009-037508, on May 29, 2009. Id.

24 Also on May 29, 2009, based on plaintiff's alleged default  
25 beginning in November 2008, U.S. Bank appointed defendant Northwest  
26 Trustee Services, Inc., as the successor and foreclosing trustee  
27 under the Deed of Trust. Id.; Exh. 3 to Stenman Declr. The  
28 appointment was recorded on May 29, 2009 in Clackamas County as



1 instrument number 2009-035709. Id. The Trustee commenced  
2 foreclosure. A Notice of Default and Election to Sell was recorded  
3 in Clackamas County on May 29, 2009, as instrument number 2009-  
4 037510. Id.; Exh. 4 to Stenman Declr.

5 The property was originally scheduled for auction on October  
6 9, 2009. Stenman Declr. at p. 3. However, the sale was stayed  
7 because plaintiff attempted to cure the default. Id. However,  
8 plaintiff apparently failed to cure the default because he tendered  
9 an allegedly fraudulent money order which was returned for non-  
10 payment. Id.

11 Foreclosure proceedings have resumed. Id. A second Notice of  
12 Default and Election to Sell was recorded in Clackamas County on  
13 October 6, 2009, as instrument number 2009-069913. Id.; Exh. 5 to  
14 Stenman Declr. That notice recites that the property will be sold  
15 at a trustee's sale on February 16, 2010. Id. Currently, no  
16 trustee's sale has occurred and no trustee's deed has been issued  
17 for the property. Id.

18 The evidence submitted by defendants shows that the real  
19 property referenced by plaintiff in his Complaint is in the process  
20 of being foreclosed. This process is governed by state, not  
21 federal law. See Or. Rev. Stat. §§ (O.R.S.) 86.705 - 86.990  
22 (Oregon Trust Deed Act). Without more, foreclosures of real  
23 property under a non-judicial foreclosure process established by  
24 state law, do not give rise to a federal question cause of action.  
25 See Easton, 114 F.3d at 982.

26 In summary, plaintiff fails to establish that this Court has  
27 subject matter jurisdiction over this action under 28 U.S.C. §§  
28 1331 or 1332. The record shows the presence of a non-diverse

1 defendant, precluding diversity jurisdiction. The allegations in  
2 plaintiff's Complaint do not reveal the basis of a federal question  
3 claim and the citation of federal statutes, without more, are  
4 insufficient to create a federal question. The evidence submitted  
5 by defendants in support of their Rule 12(b)(1) motions indicates  
6 that the claims are likely grounded in state law.

7 Accordingly, the Complaint must be dismissed for want of  
8 federal jurisdiction. Blackburn v. United States, 100 F.3d 1426,  
9 1436 (9th Cir. 1996) (subject matter jurisdiction is a threshold  
10 issue, in the absence of which the court cannot proceed to hear  
11 other issues); see also Stewart v. Mortgage Elec. Reg. Sys., Inc.,  
12 No. CV-09-687-PK, 2009 WL 3698104, at \*4 (D. Or. Oct. 6, 2009)  
13 (concluding that Complaint filed by plaintiff in similar action  
14 contained no appropriate statement of the grounds for the court's  
15 jurisdiction) (Findings & Recommendation adopted by Judge King on  
16 November 4, 2009); Stewart v. Mortgage Elec. Reg. Sys., Inc., No.  
17 CV-09-688-PK, 2009 WL 3734108, at \*5 (D. Or. Oct. 6, 2009) (same)  
18 (Findings & Recommendation adopted by Judge King on November 4,  
19 2009).

## 20 II. Admiralty Jurisdiction

21 As noted above, plaintiff refers to the action being "In  
22 Admiralty" in the caption of the Complaint. Compl. at p. 1. He  
23 also recites that he seeks a "remedy in Admiralty as is provided by  
24 'The Savings to the Suitors Clause'" of 28 U.S.C. § 1333(1). " Id.  
25 However, it is apparent from the face of the Complaint that no  
26 admiralty jurisdiction exists or could exist under any conceivable  
27 allegations.

28 The admiralty jurisdiction of the federal courts is governed

1 by 28 U.S.C. § 1333 which provides:

2 The district courts shall have original jurisdiction,  
3 exclusive of the courts of the States, of:

4 (1) Any civil case of admiralty or maritime  
5 jurisdiction, saving to suitors in all cases all other  
6 remedies to which they are otherwise entitled.

7 (2) Any prize brought into the United States and all  
8 proceedings for the condemnation of property taken as  
9 prize.

10 28 U.S.C. § 1333.

11 In determining the boundaries of admiralty jurisdiction, the  
12 court looks to the purpose of the Congressional grant. Exxon Corp.  
13 v. Central Gulf Lines, Inc., 500 U.S. 603, 608 (1991). The  
14 fundamental interest giving rise to maritime jurisdiction is the  
15 protection of maritime commerce. Id.; see also Ventura Packers,  
16 Inc. v. F/V Jeanine Kathleen, 305 F.3d 913, 917 (9th Cir. 2002)  
17 ("Though not confined to vessels, admiralty naturally centers  
18 around them, as the great agents of maritime affairs.").

19 The subject matter of the dispute in this case is real  
20 property in Clackamas County, Oregon, and there are no facts  
21 asserted to support an admiralty claim. Additionally, the "saving  
22 to suitors" clause is not an independent source of federal  
23 admiralty jurisdiction, but rather, is a statement that state  
24 courts may adjudicate maritime causes of action in proceedings  
25 where defendant is a person, not a ship or some other instrument of  
26 navigation. Ghotra v. Bandila Shipping, Inc., 113 F.3d 1050, 1054  
27 (9th Cir. 1997). The saving to suitors clause also permits a  
28 plaintiff to bring an action "at law" in the federal district  
court, provided the requirements of diversity of citizenship and  
amount in controversy are met. Id.

1 The Complaint establishes no basis for this Court's admiralty  
2 jurisdiction under 28 U.S.C. § 1333.

3 III. Rule 8

4 All defendants except First Pacific contend that plaintiff's  
5 Complaint fails to meet the requirements of Federal Rule of Civil  
6 Procedure 8. I agree.

7 Pursuant to Rule 8(a), a complaint shall include "a short and  
8 plain statement of the claim showing that the pleader is entitled  
9 to relief." Fed. R. Civ. P. 8(a). Additionally, "[e]ach averment  
10 of a pleading shall be simple, concise and direct." Fed. R. Civ.  
11 P. 8(e).

12 If the factual elements of a cause of action are scattered  
13 throughout the complaint but are not organized into a "short and  
14 plain statement of the claim," dismissal for failure to satisfy  
15 Rule 8(a) is proper. Sparling v. Hoffman Constr. Co., 864 F.2d  
16 635, 640 (9th Cir. 1988); see also McHenry v. Renne, 84 F.3d 1172,  
17 1179 (9th Cir. 1996) (affirming dismissal of complaint which  
18 vaguely referred to "defendants" or "other responsible authorities"  
19 and failed to link factual allegations to specific defendants).

20 The Complaint, while not overly long at approximately eleven  
21 pages, begins with statements regarding admiralty jurisdiction,  
22 followed by one and one-half pages of citations to, and quotes  
23 from, cases whose relevance is unclear. Compl. at pp. 1-3. My  
24 best understanding is that some of these citations are meant to  
25 support plaintiff's request for a jury trial and others appear to  
26 relate to misconduct by a public officer. Next, plaintiff makes  
27 assertions of jurisdiction, discussed above, followed by a  
28 statement that plaintiff is a secured party creditor. Id. at p. 3.

1 Plaintiff then spends several pages setting forth his three  
2 causes of action. Id. at pp. 4-11. All references are to  
3 defendants with no allegation of the particular wrongdoing of a  
4 particular defendant. The first "cause of action," concerning the  
5 supposed lack of standing to foreclose, makes reference to the  
6 "real party in interest." Id. at pp. 4-7. Plaintiff alleges that  
7 "Defendants have not rendered any verifiable proof that either of  
8 them has '**Standing,**' and/or is a '**Real Party in Interest.**' Who has  
9 standing to bring this TRUSTEE's SALE Who is the Real Party of  
10 Interest?" Id. at p. 5. This allegation is followed by two pages  
11 of out-of-context quotes from several district court cases across  
12 the nation, and from various federal statutes. There is no  
13 allegation of any specific acts or omissions of a defendant named  
14 in the case.

15 Next, in the second "cause of action," plaintiff contends that  
16 defendants were paid when they sold the original promissory note.  
17 Id. at p. 7. Plaintiff then cites to a 1968 case, perhaps from  
18 Minnesota but the reference is unclear, followed by a quote which  
19 appears irrelevant. Again, no allegation of any specific act or  
20 omission of a defendant named in the case appears.

21 In the third "cause of action," plaintiff recites the five  
22 alleged confessions made by defendants, followed by citations to  
23 various authorities, along with quotes regarding silence,  
24 acquiescence, and fraud. Id. at pp. 8-9. Plaintiff appears to  
25 allege that because defendants failed to refute certain assertions  
26 in affidavits plaintiff had sent to defendants before this action  
27 was filed, defendants have now conceded these assertions and are  
28 bound by them. Id. Again, there is no allegation of any specific

1 act or omission of a defendant named in this case.

2 Following the pages of the actual Complaint, plaintiff  
3 attaches five separate exhibits totaling 157 pages. Exhs. A to E.  
4 The relevance of these documents is not clearly related to the  
5 "causes of action," other than that Exhibits B, D, and E are  
6 apparently three of the affidavits containing assertions that  
7 defendants have allegedly failed to refute.

8 Although a federal court's notice pleading rules are liberal  
9 in their requirements, under notice pleading, the "short and plain"  
10 statement must still give "'the defendant fair notice of what the  
11 plaintiff's claim is and the grounds upon which it rests.'" Walsh  
12 v. Nevada Dep't of Human Resources, 471 F.3d 1033, 1036 (9th Cir.  
13 2006) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).  
14 Plaintiff fails to clearly specify the legal theories upon which he  
15 relies, and fails to make any substantive allegations concerning  
16 the particular conduct of defendants. He also fails to clearly  
17 link which causes of action are being asserted against a particular  
18 defendant. As such, the Complaint violates Rule 8. See McHenry,  
19 84 F.3d at 1178 (noting that pleadings containing averments largely  
20 irrelevant or of slight relevance, "rather than clear and concise  
21 averments stating which defendants are liable to plaintiffs for  
22 which wrongs," violate Rule 8).

#### 23 IV. Failure to State a Claim

24 All defendants move to dismiss the Complaint for failure to  
25 state a claim under Rule 12(b)(6). On a Rule 12(b)(6) motion to  
26 dismiss, the court must review the sufficiency of the complaint.  
27 Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). All allegations of  
28 material fact are taken as true and construed in the light most

1 favorable to the nonmoving party. American Family Ass'n, Inc. v.  
2 City & County of San Francisco, 277 F.3d 1114, 1120 (9th Cir.  
3 2002). However, the court need not accept conclusory allegations  
4 as truthful. Holden v Hagopian, 978 F.2d 1115, 1121 (9th Cir.  
5 1992).

6 In its present form, as discussed above, because plaintiff's  
7 claims are so poorly articulated, it is challenging to discern what  
8 they are, much less ascertain whether they state a cognizable  
9 claim. As addressed herein, plaintiff's allegations fail to state  
10 claims under any of the federal statutes he cites. The Complaint's  
11 recitations made in support of plaintiff's three causes of action  
12 appear unrelated to any of the three federal statutory sections  
13 cited by plaintiff. That is, if plaintiff alleges a violation of  
14 RESPA's provision regarding loan servicers' responses to borrower  
15 inquiries under 12 U.S.C. § 2605(e), his allegations fail to state  
16 the elements of that claim in any discernable fashion. The same is  
17 true for the TILA and FDCPA references.

18 Additionally, while plaintiff's Complaint makes some passing  
19 references to fraud, and plaintiff refers to the action as being a  
20 "Complaint of Fraud in a Trustee's Sale" in the caption, Compl. at  
21 pp. 1, 6, 8, the Complaint fails to meet the requirements of  
22 Federal Rule of Civil Procedure 9 and thus, fails to state a fraud  
23 claim. Under Rule 9(b), a fraud claim must be "specific enough to  
24 give defendants notice of the particular misconduct so that they  
25 can defend against the charge and not just deny that they have done  
26 anything wrong." Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1106  
27 (9th Cir. 2003) (internal quotation and ellipsis omitted). "A  
28 plaintiff must set forth more than the neutral facts necessary to

1 identify the transaction. The plaintiff must set forth what is  
2 false or misleading about a statement, and why it is false." Id.  
3 (internal quotation and brackets omitted). "Averments of fraud must  
4 be accompanied by the who, what, when, where, and how of the  
5 misconduct charged." Id. (internal quotation omitted).

6 The Complaint fails to identify which defendant made allegedly  
7 fraudulent representations, in what context, at what time, and to  
8 whom. It also fails to allege what was false or misleading and  
9 why. As such, plaintiff fails to state a fraud claim.

#### 10 V. Appearance on Behalf of Another

11 In the Complaint, plaintiff includes several references to  
12 being "Morse Edward Stewart, Secured Party Creditor." Compl. at  
13 pp. 1, 3, 11. The first recitations in the Complaint suggest that  
14 plaintiff considers himself to be a separate entity from "Morse  
15 Edward Stewart, Secured Party Creditor." Compl. at p. 1  
16 (indicating that "Morse Edward Stewart, Secured Party Creditor"  
17 appears on behalf of plaintiff).

18 Under both Oregon and federal law, a corporation or other  
19 entity must be represented by counsel. United States v. High  
20 Country Broad. Co., 3 F.3d 1244, 1245 (9th Cir. 1993); ORS 9.320  
21 (action may be prosecuted personally or by attorney, however the  
22 state or a corporation must be represented by attorney).

23 Additionally, 28 U.S.C. § 1654 provides that in federal court,  
24 "parties may plead and conduct their own cases personally or by  
25 counsel as, by the rules of such courts, respectively, are  
26 permitted to manage and conduct causes therein." Under this  
27 statute, the privilege to represent oneself pro se is personal to  
28 the litigant and does not extend to other parties or entities.



1 Simon v. Hartford Life, Inc., 546 F.3d 661, 664 (9th Cir. 2008);  
2 see also C.E. Pope Equity Trust v. United States, 818 F.2d 696, 697  
3 (9th Cir. 1987) ("Although a non-attorney may appear in propria  
4 persona in his own behalf," the issue must be personal to the  
5 non-attorney and he has no authority to appear on behalf of  
6 others.).

7 Here, plaintiff may not appear on behalf of "Morse Edward  
8 Stewart, Secured Party Creditor," and "Morse Edward Stewart,  
9 Secured Party Creditor" may not appear on behalf of plaintiff.  
10 Because, at this point, the Complaint does not make clear how  
11 plaintiff might be a secured party creditor to his own home  
12 mortgage loan, I construe the Complaint as having been brought by  
13 plaintiff as an individual and on only his own behalf. Any  
14 references to "Morse Edward Stewart, Secured Party Creditor" as  
15 being a separate party, are irrelevant.

16 VI. Amendment

17 Pro se complaints are to be liberally construed. Wolfe v.  
18 Strankman, 392 F.3d 358, 362 (9th Cir. 2004). Although defendants  
19 urge dismissal of the Complaint with prejudice and without leave to  
20 amend, dismissal of a pro se complaint without leave to amend is  
21 proper only if it is clear that the deficiencies of the complaint  
22 cannot be cured by amendment. Lucas v. Department of Corrections,  
23 66 F.3d 245, 248 (9th Cir. 1995). In this case, because plaintiff  
24 may be able to amend and properly assert a claim, I allow him the  
25 opportunity to refile, subject to the discussion below.

26 A. Jurisdiction

27 The only way plaintiff can cure the defect regarding diversity  
28 jurisdiction is to dismiss First Pacific, the non-diverse

1 defendant.

2 As for federal question jurisdiction, plaintiff should  
3 identify the precise federal statute or constitutional provision he  
4 alleges has been violated, and then must articulate the elements of  
5 the claim(s) in a readable, coherent fashion such that the Court  
6 can understand the federal question nature of the claim being  
7 asserted.

8 B. Parties

9 As noted above, plaintiff may appear only on behalf of  
10 himself. Any amended pleading should omit any reference to any  
11 other plaintiff.<sup>4</sup>

12 Two defendants assert that they are not proper parties to this  
13 action. First, defendant Northwest Trustee Services, Inc. argues  
14 that because plaintiff does not move to enjoin the foreclosure  
15 sale, or to determine its validity, it is not a proper defendant  
16 and must be dismissed from the action. Oregon law provides that

17 [a] trustee or successor trustee is a necessary and  
18 proper party to any proceeding to determine the validity  
19 of or enjoin any private or judicial proceeding to  
20 foreclose a trust deed, but a trustee or successor  
21 trustee is neither a necessary nor a proper party to any  
22 proceeding to determine title to the property subject to  
23 the trust deed, or to any proceeding to impose, enforce  
24 or foreclose any other lien on the subject property.

25 O.R.S. 86.790(4).

26 Given that the Complaint fails to articulate any cognizable  
27 claim against any of the defendants at this point, I do not think  
28 it is appropriate to dismiss Northwest Trustee Services at this  
point. Although the Complaint lacks an express request for

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<sup>4</sup> Plaintiff may, however, obtain counsel to represent any  
plaintiff(s).

1 injunctive relief, plaintiff does seek an order quashing the  
2 foreclosure, suggesting that plaintiff views the litigation as a  
3 proceeding to determine the validity of, or to enjoin, the  
4 foreclosure. Also, it is conceivable that plaintiff could plead  
5 some actionable claim in an amended pleading that is neither a  
6 proceeding to determine title nor a proceeding concerned with  
7 another lien. However, it is appropriate to caution plaintiff that  
8 even though he appears pro se, he is still subject to Federal Rule  
9 of Civil Procedure 11 which requires that he have a good faith  
10 basis for believing that a claim is warranted by existing law and  
11 that the factual contentions have evidentiary support. Fed. R.  
12 Civ. P. 11(b). Violation of Rule 11 may subject plaintiff to  
13 sanctions. Fed. R. Civ. P. 11(c).

14 Defendant Washington Mutual, F.A. also asserts that it is not  
15 a proper party to this action. It further contends that it has  
16 been misnamed in the Complaint. In its memorandum in support of  
17 the motion to dismiss, Washington Mutual represents that on  
18 September 25, 2008, the Federal Deposit Insurance Corporation  
19 (FDIC), seized Washington Mutual and appointed a receiver.  
20 Washington Mutual states that it ceased to exist on that date. It  
21 also states that the FDIC's claim administration process has  
22 exclusive venue over any claim against the former entity and that  
23 while JPMorgan Chase Bank purchased some of Washington Mutual's  
24 former assets, it did not assume any liability for Washington  
25 Mutual's debts or actions.

26 The problem with dismissing Washington Mutual at this point is  
27 that other than these statements in the memorandum, there is no  
28 evidence in the record in the form of an affidavit, declaration, or

1 exhibits, to support these assertions. Because I grant the motion  
2 to dismiss the Complaint for three separate reasons (lack of  
3 subject matter jurisdiction, violation of Rule 8, failure to state  
4 a claim), I find it unnecessary to further consider Washington  
5 Mutual's argument at this point. While its representations may be  
6 correct, they are not adequately supported.

7 I once again caution plaintiff, however, that in any amended  
8 pleading, he must comply with the requirements of Rule 11 and thus,  
9 must have a good faith basis for believing that Washington Mutual  
10 is a properly named defendant.

#### 11 C. Claims

12 As discussed above, plaintiff's Complaint violates Rule 8 and  
13 fails to state a claim. Any amended pleading must contain a short  
14 and plain statement showing that plaintiff is entitled to relief  
15 and must articulate a cognizable legal theory. If alleging fraud,  
16 plaintiff must comply with Rule 9, as noted above.

17 Finally, in plaintiff's December 1, 2009 response to the  
18 motions to dismiss<sup>5</sup>, he attempts to assert eighteen  
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20 <sup>5</sup> At the time the motions to dismiss in this case were  
21 filed, the Local Rules of this Court required responses to these  
22 motions to be filed within eleven days of service. Former L.R.  
23 7.1(3). Federal Rule of Civil Procedure 6 allows for any extra  
24 three days for mailing. Thus, plaintiff's responses to the  
25 motions were due fourteen days after service. Service of a  
26 motion is complete upon mailing. Fed. R. Civ. P. 5(b).

27 Northwest Trustee's motion was served on plaintiff on  
28 October 19, 2009 (dkt #3, #5), and thus, plaintiff's response was  
due on November 3, 2009. The remaining defendants, other than  
First Pacific, served a combined motion on plaintiff on October  
27, 2009 (dkt #7), making the response due on November 10, 2009.  
First Pacific's motion was served on plaintiff on November 19,  
2009 (dkt #23), making the response due on December 3, 2009.  
Plaintiff's December 1, 2009 response was timely only as to First

1 "counterclaims." I do not consider these to be part of the  
2 litigation. First, a counterclaim must be asserted in a pleading.  
3 Fed. R. Civ. P. 13. A response to a motion to dismiss is not a  
4 pleading. See Fed. R. Civ. P. 7 (listing pleadings allowed).

5 Second, a counterclaim is a claim brought by the opposing  
6 party against the party bringing the original claim. Black's Law  
7 Dictionary 376 (8th ed. 2004) (defining counterclaim as "[a] claim  
8 for relief asserted against an opposing party after an original  
9 claim has been made; esp., a defendant's claim in opposition to .  
10 . . the plaintiff's claim."). That is, after a plaintiff brings a  
11 claim against a defendant, the opposing party, meaning the  
12 defendant, may then assert a counterclaim against the party  
13 originally bringing the claim, meaning the plaintiff. A plaintiff  
14 wanting to bring additional claims does not bring "counterclaims,"  
15 but rather, files an amended complaint, or seeks leave to file an  
16 amended complaint, adding such claims. Accordingly, I disregard  
17 any reference to "counterclaims" contained in plaintiff's response  
18 to the motions to dismiss.

#### 19 CONCLUSION

20 Defendants' motions to dismiss (#3, #7, #23) should be  
21 granted. Because plaintiff appears pro se, he should have leave to  
22 amend to cure the deficiencies outlined above. Any amended  
23 complaint is due thirty days after entry of an order by the Article  
24 III District Court Judge on the merits of this Findings &  
25 Recommendation. This case will be dismissed if no amended  
26 \_\_\_\_\_

27 Pacific's motion. Although I have considered the response as to  
28 the other motions, I admonish plaintiff that in the future, he  
must comply with the time requirements in the Local Rules.

1 complaint is timely filed.

2 SCHEDULING ORDER

3 The Findings and Recommendation will be referred to a district  
4 judge. Objections, if any, are due January 25, 2010. If no  
5 objections are filed, then the Findings and Recommendation will go  
6 under advisement on that date.

7 If objections are filed, then a response is due February 11,  
8 2010. When the response is due or filed, whichever date is  
9 earlier, the Findings and Recommendation will go under advisement.

10 IT IS SO ORDERED.

11 Dated this 6th day of January, 2010.

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14 /s/ Dennis James Hubel  
15 Dennis James Hubel  
16 United States Magistrate Judge  
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